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# Online Child Grooming – Some Remarks Against the Background of the Pandemic<sup>2</sup>

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## Abstract

Protection of children against sexual exploitation, particularly against exploitation in cyberspace, constitutes one of the most burning issues of the modern world. The Internet is frequently used as the beginning of the road to sexually exploiting a child, and as way of earning the child's trust and gaining physical access to them. Unfortunately, the COVID-19 pandemic and isolation resulting from it brought with them substantial threats, also in this area, whose effects will be long-term. What was observed during the pandemic was not only an increase in online traffic related to the distribution of child pornography, but also a definite increase in behaviours that may be classified as grooming. It is sometimes considered that grooming is the basic method leading to child sexual exploitation, or even its immanent feature. Relatedly, what becomes an important issue is an analysis of legal regulations that concern grooming in cyberspace, and an attempt to answer the question whether the scope and level of protection provided to children by Polish criminal law are sufficient.

**Keywords:** grooming, child sexual abuse, COVID-19 pandemic.

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## *Online child grooming* – kilka uwag na tle pandemii<sup>3</sup>

### Streszczenie

Ochrona dzieci przed seksualnym wykorzystaniem, w tym w szczególności wykorzystaniem w cyberprzestrzeni, stanowi jeden z najbardziej palących problemów współczesnego świata. Internet często jest wykorzystywany jako początek drogi prowadzącej do seksualnego wykorzystania dziecka, sposób na pozyskanie jego zaufania i uzyskanie fizycznego do niego dostępu. Niestety pandemia Covid-19 i będąca jej efektem izolacja także w tej dziedzinie przyniosła niebagatelne zagrożenia, których skutki będą długofalowe. W trakcie pandemii zaobserwowano nie tylko wzrost ruchu sieciowego związanego z rozpowszechnianiem pornografii dziecięcej, ale także zdecydowany wzrost zachowań, które mogą być klasyfikowane jako *grooming*. Niekiedy uważa się, że *grooming* jest podstawową metodą prowadzącą do seksualnego wykorzystania dzieci, a nawet jego cechą immanentną. Sprawą istotną staje się w związku z tym analiza uregulowań prawnych dotyczących *groomingu* w cyberprzestrzeni i próba odpowiedzi na pytanie, czy wystarczający jest zakres i stopień ochrony zapewniany przez polskie prawo karne.

**Słowa kluczowe:** *grooming*, seksualne wykorzystanie dziecka, pandemia COVID-19.

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## Introduction

The emergence of global ICT networks created a completely new environment – a dynamic, rapidly evolving and constantly changing space whose scale and degree of development cannot even be estimated.<sup>4</sup> The Internet – a global network used in mid-2020 by 62% of the world population and over 87% of the European population<sup>5</sup> – is an element of that powerful structure.

Cyberspace makes a whole range of activities possible, whose purpose is to make its users' lives easier. These activities include, among other things, remote transactions, online banking or a wide range of e-administration activities. However, one cannot ignore the fact that virtual space also makes it easier to engage in behaviours that are at least undesirable and, in many cases, prohibited by law. It should be emphasised that all improper, undesirable or prohibited behaviours potentially become much more dangerous in cyberspace. The scope of any activities undertaken in IT networks is practically unlimited, both in terms of space and time. Access to information processed in global networks is possible anywhere in the world in real time.

Communication and information technologies provide for access to information (including audio and video) and its collection, processing and exchange on a global scale while often giving one a sense of security and anonymity. What is more, they allow not only for data transmission in cyberspace but also for recording such transmissions.

There is no doubt that sexually exploiting a child exclusively in cyberspace (i.e. without any contact between the offender and the victim in the real world) is possible. Such exploitation may be e.g. an offender's action that involves coaxing a child to strip in front of a web camera or to pose in an explicitly sexual way (even in full clothing, but with suggestive touching of their intimate area), and recording the image of the child as they engage in such activities, and then distributing such recorded material.

Protection of children against sexual exploitation, particularly against exploitation in cyberspace, constitutes one of the most burning issues of the modern world. The threat is all the bigger because children and young people quickly and eagerly

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<sup>4</sup> See: R. Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, Oxford 2010, pp. 61–62.

<sup>5</sup> <http://www.internetworldstats.com/stats.htm> (access: 26.09.2020).

adapted to the virtual environment, and social media, including i.a. Facebook, Instagram or Snapchat, became their main places for the purpose of networking and exchanging information.

The Internet contains a huge amount of content that shows child sexual exploitation. The development of technology and its wide availability make the process of documenting sexual exploitation easier. In order to make high-quality content, high-end equipment is not necessary any more – using a laptop or a smartphone is enough. The evolving equipment technology also significantly influences who makes video recordings and images that show child sexual exploitation. Equipment that is easily accessible and relatively cheap, especially web cameras, digital cameras and smartphones, allows offenders to commit crimes in their own homes at their convenience.

At the same time, the Internet is frequently used as the beginning of the road to sexually exploiting a child, and as way of earning the child's trust and gaining physical access to them. Unfortunately, the COVID-19 pandemic and isolation resulting from it brought with them substantial threats, also in this area, whose effects will be long-term.<sup>6</sup>

The COVID-19 pandemic, or more precisely, measures taken to curb its spreading had a significant influence on an increase in crime related to child sexual exploitation in cyberspace. It was a result of, among other things, closing schools and moving education to the virtual environment; prolonging the time that children spent online for entertainment, social and educational purposes; prolonging the time spent at home due to lockdown; restricting access to support provided by people and organisations offering childcare that frequently play a key role in detecting and reporting cases of child sexual exploitation.<sup>7</sup>

Offenders who have operated exclusively or mostly on the Internet so far increased the time that they spent online and simultaneously intensified their activities. Those who operated in the real world, including those who often travelled, largely moved their activities to cyberspace in connection with movement restriction.<sup>8</sup>

A report by Europol that has been monitoring various indicators allowing for assessing the scope of online child sexual exploitation since the crisis related to COVID-19 points out an increase in sexual exploitation cases, despite the fact that

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<sup>6</sup> More on the legal consequences of the pandemic, see e.g.: P. Chmielnicki, D. Minich, R. Rybkowski, M. Stachura, K. Szocik, *The COVID-19 Pandemic as an Opportunity for a Permanent Reduction in Civil Rights*, "Studia Iuridica Lublinensia" 2021, 4, p. 82–85.

<sup>7</sup> Interpol, *Threats and Trends Child Sexual Exploitation and Abuse: Covid-19 Impact*, September 2020, p. 4 ff., <https://www.interpol.int/content/download/15611/file/COVID19%20-%20Child%20Sexual%20Exploitation%20and%20Abuse%20threats%20and%20trends.pdf> (access: 26.09.2020).

<sup>8</sup> *Ibidem*, p. 5.

the data are fragmentary and incomplete. The increase in sharing and distributing content that shows child sexual exploitation (child sexual assault material, CSAM) was noted both in peer-to-peer (P2P) networks and on the Internet (both on the clear web and on the dark web).<sup>9</sup>

According to the Internet Watch Foundation data,<sup>10</sup> it was only in Great Britain that a sharp increase in attempts to access content showing child sexual exploitation was noted during the pandemic (nearly 9 million such attempts were noted in March–April 2020).<sup>11</sup>

The American organisation National Center for Missing & Exploited Children<sup>12</sup> (NCMEC) registered an increase in reported CSAM content by 106% (from 983,734 reports in March 2019 to 2,027,520 reports in March 2020).<sup>13</sup> In April 2020, over 4 million such reports were registered.<sup>14</sup> According to the data by the NCMEC, an increase by over 90% in the number of CSAM reports was noted in the first half (January–June) of 2020 in relation to the corresponding period in 2019 (6,328,910 reports in 2019 and 12,052,816 reports in 2020).<sup>15</sup>

What was observed during the pandemic was not only an increase in online traffic related to the distribution of child pornography, but also a definite increase in behaviours that may be classified as grooming.

<sup>9</sup> Europol, *Exploiting Isolation: Offenders and Victims of Online Child Sexual Abuse during the COVID-19 Pandemic*, 19 June 2020, p. 5, <https://www.europol.europa.eu/publications-documents/catching-virus-cybercrime-disinformation-and-covid-19-pandemic> (access: 26.09.2020).

<sup>10</sup> British non-governmental non-profit organisation that combats harmful content on the Internet. It is primarily focused on fighting child sexual exploitation, including online child pornography. It is co-funded i.a. by the European Union and its partner companies (as members), such as i.a. Amazon, AT&T, Apple, Google, Cisco, Twitter, Facebook, British Telecom, Microsoft, etc. (see [www.iwf.org.uk](http://www.iwf.org.uk)).

<sup>11</sup> <https://www.iwf.org.uk/news/millions-of-attempts-to-access-child-sexual-abuse-online-during-lockdown>, (access: 26.09.2020).

<sup>12</sup> Private non-profit organisation founded in the USA. It is aimed at assistance in finding missing children, limiting child sexual exploitation, and preventing the victimisation of the children, <https://www.missingkids.org/footer/about> (access: 26.09.2020).

<sup>13</sup> T. Brewster, *Child Exploitation Complaints Rise 106% to Hit 2 Million in Just One Month: Is COVID-19 to Blame?* "Forbes" 24.04.2020, <https://www.forbes.com/sites/thomasbrewster/2020/04/24/child-exploitation-complaints-rise-106-to-hit-2-million-in-just-one-month-is-covid-19-to-blame/#407652d34c9c> (access: 26.09.2020).

<sup>14</sup> T. Brewster, *Online Child Abuse Complaints Surpass 4 Million In April: This is How Cops Are Coping Despite COVID-19*, "Forbes" 9.05.2020, <https://www.forbes.com/sites/thomasbrewster/2020/05/09/online-child-abuse-complaints-surpass-4-million-in-april-this-is-how-cops-are-coping-despite-covid-19/#4308057248db> (access: 26.09.2020).

<sup>15</sup> <https://www.missingkids.org/blog/2020/covid-19-and-missing-and-exploited-children> (access: 26.09.2020).

According to the NCMEC data, in the first half (January–June) of 2020, there was an increase by over 93% in online enticement<sup>16</sup> of sexual nature in relation to the same period in 2019 (from 6,863 cases in 2019 to 13,268 cases in 2020).<sup>17</sup> The Europol report also indicates that an increase in reported cases of online sexual enticement<sup>18</sup> was noted in EU Member States.

Relatedly, what becomes an important issue is an analysis of legal regulations that concern grooming in cyberspace, and an attempt to answer the question whether the scope and level of protection provided to children are sufficient.

## The Definition of Online Grooming

Online grooming, which is one of many types of grooming, is defined in the literature as a process in which an adult who is sexually interested in a child builds a relationship with the child in the virtual world in order to commit sex crimes that require physical contact or not.<sup>19</sup> However, it should be noted that such a definition no longer adheres to behaviours in cyberspace. Firstly, in the light of research, a great number of offenders are not 18 years of age, therefore it is not justified to assume that grooming is a process of an adult influencing a child, because it eliminates from the scope of the term a whole range of behaviours that should be considered grooming.<sup>20</sup> An assumption that a groomer is a person who is 'sexually interested' in the victim may eliminate persons who are not sexually interested in the child, but may act on behalf of a sexually interested third party. Therefore, online grooming should rather define behaviour or a process in which an offender, acting on behalf of themselves or a third party, builds a relationship with a child

<sup>16</sup> Enticement includes i.a. encouraging a child to share unambiguously sexual images, engaging the child in conversations of explicitly sexual nature, see: <https://www.missingkids.org/content/dam/missingkids/pdfs/ncmec-analysis/Online%20Enticement%20Exe%20Summary.pdf> (access: 26.09.2020).

<sup>17</sup> <https://www.missingkids.org/blog/2020/covid-19-and-missing-and-exploited-children> (access: 26.09.2020).

<sup>18</sup> Europol, op. cit., p. 8.

<sup>19</sup> J. Bryce, *Online Sexual Exploitation of Children and Young People*, [in:] Y. Jewkes, M. Yar, *Handbook of Internet Crime*, Cullompton 2010, p. 329; A similar definition is included in a report from the European Online Grooming Project, in which *online grooming* is the name for the process during which an offender befriends a child in the virtual world (online), for the purpose of making the following easier: sexual contact in cyberspace and/or a physical meeting, with the intention of sexually exploiting the child; for the purpose of the project, a child was defined as a person under the age of 16 (S. Webster et al., *European Online Grooming Project: Final Report*, 2012, <http://natcen.ac.uk/media/22514/european-online-grooming-projectfinalreport.pdf> (access: 1.09.2017)).

<sup>20</sup> See: A.-M. McAlinden, *'Grooming' and the Sexual Abuse of Children: Institutional, Internet, and Familial Dimensions*, Oxford 2012, p. 48

in the virtual world in order to bring the child to participation in sexual activities that require physical contact or not. According to such a definition of online grooming, the offender is a person who initiates contact with a child in an IT network in order to bring the child to participation in sexual activities in cyberspace or in the real world.<sup>21</sup>

Online grooming is particularly dangerous. Firstly, an offender is given ample opportunities for hiding their identity, and primarily has access to a great number of potential victims at the same time. If a groomer operating in the real world inevitably limits themselves to a process regarding one child or, in extremely favourable circumstances, several children, there are no such limitations in cyberspace, which translates into a definitely higher probability of finding a victim.

It was a long time ago that psychological and sociological studies on relationships between sexual orientation disorders (paedophilia) and the Internet led to defining particularly the following activities enabled by the Internet: immediate access to other sexual 'hunters' around the world; open discussion about sexual desires and needs; exchanging opinions and ideas regarding ways of luring victims; mutual support concerning paedophilic philosophy of sexual contact between adults and children; immediate access to potential victims (children) around the world; hiding one's identity for the purpose of contacting a child, particularly impersonating a teenage member of discussion groups; open access to chatrooms for teenagers for the purpose of selecting a potential victim and the method of getting close to them; identifying and tracking information, including contact information, regarding the potential victim; building a long-term virtual relationship with the potential victim prior to attempting to make physical contact with the child.<sup>22</sup>

It should be emphasised that online grooming may not, in any case, be referred exclusively to paedophilia. Sex offenders against children stopped coming from the group of individuals afflicted with the paraphilia a long time ago. Nowadays, an even greater group are offenders without any sexual orientation disorder. They involve children in sexual behaviours in cyberspace – for money. In this situation, online grooming seems even more sinister, and law provide for particular protection against such activity.

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<sup>21</sup> See also: J. Davidson, P. Gottschalk, *Online Groomers: Profiling, Policing and Prevention*, Lyme Regis 2010, p. 42.

<sup>22</sup> D. Mahoney, N. Faulkner, *A Brief Overview of Pedophiles on the Web*, 1997, <https://www.healthyplace.com/abuse/articles/pedophiles-on-the-web> (access: 28.08.2017).

## Regulations *de Lege Lata* Concerning Online Grooming

The necessity of providing a child<sup>23</sup> with protection against grooming in cyberspace has been noticed. In Article 23 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention),<sup>24</sup> solicitation of a child for sexual purposes was defined as an adult's proposal, through ICT, to meet a child for the purpose of sexually exploiting<sup>25</sup> the child – if the proposal is followed by actions that are supposed to lead to the meeting. Pursuant to Article 23 of the Convention, such behaviour should be penalised.

It was also in Article 6 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA that EU Member States were obliged to criminalising the intentional solicitation of children for sexual purposes, i.e. a meeting proposal made by an adult, through ICT, to a child who has not reached the age of consent, for the purpose of engaging in sexual activities with the child's participation or for the purpose of producing child pornography – if the proposal was followed by actions that were supposed to lead to such a meeting. This obligation also concerns attempts made by a person, who entices a child below the age of consent, to obtain or gain access to child pornography with that child through ICT.

The definitions adopted in both of the above-mentioned documents uniformly define the solicitation of children for sexual purposes as making a meeting proposal by an adult to a child, through ICT, for the purpose of sexually exploiting the child (including exploiting them for purposes related to child pornography).

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<sup>23</sup> In the light of international regulations, a child is any person under the age of 18. See i.a. Article 1 of the Convention of the Rights of the Child of 20 November 1989 ([http://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch\\_IV\\_11p.pdf](http://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf), access: 27.09.2020) – a child 'means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'; in accordance with Article 9(3) of the Convention of the Council of Europe of 23 November 2001 on Cybercrime (Convention on Cybercrime, CETS No. 185, <https://rm.coe.int/1680081561>, access: 27.09.2020), 'the term "minor" shall include all persons under 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years'; in Article 2(a) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography (OJ L 335 of 17.12.2011, pp. 1–14), it was written that a child is a person below 18 years of age (the term 'age of sexual consent' was also introduced, which means a child's age defined by national law, below which engaging in sexual activities with the child's participation is prohibited).

<sup>24</sup> Signed by all member states of the Council of Europe, ratified by all the member states, with the exception of Armenia, Azerbaijan and Ireland, see: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures?p\\_auth=ZNKcajZ](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures?p_auth=ZNKcajZ) (access: 21.12.2018).

<sup>25</sup> Sexual exploitation also includes sexual abuse, i.e. within the meaning of the Convention – involving the child in prostitution or child pornography, and corrupting the child.



Unfortunately, on the basis of such definitions, law is no longer able to provide sufficient protection to a child because it did not provide for situations in which contact with the child in the real world is not necessary any more. It should also be noted that both of the above-mentioned documents, by defining the fact that a child is a person below 18 years of age, simultaneously limit the obligation of criminalising solicitation for sexual purposes to those situations in which the victim is a child below the age of consent, and the offender took action that was supposed to lead to the meeting.

Law in various countries refers to online grooming in different ways. The main difference concerns the requirement of a proposal to a child to meet in the real world. The most penalised behaviour is the one that involves a meeting proposal to a child below the age of consent, with the proposal being made through ICT, with the intention of engaging in sexual activities with the child, and pursuing such a meeting. Such a solution was adopted i.a. in: Netherlands (*Wetboek van Strafrecht* – Article 248e), Belgium (*Code Penal* – Article 377<sup>quater</sup>), Spain (*Código Penal* – Article 183<sup>ter</sup>), Norway (*Straffeloven* – Article 201a), Portugal (*Código Penal* – Article 176A) or Sweden (*Brottsbalk* – Section 6, paragraph 10a).

In other countries, i.a. in Austria (in Article 208a of the *Strafgesetzbuch*, the expression ‘or in a different manner that is misleading as to the intentions of the offender’<sup>26</sup> was used) and Croatia (*Kazneni zakon* – Article 161), ways other than only ICT are permitted when it comes to proposing such a meeting.

The widest scope of protection of a child against online grooming is provided by countries in which the adopted solutions exclude a meeting proposal and the necessity of pursuing such a meeting and criminalise propositioning a child below the age of consent through ICT (this is the case i.a. in France: *Code Penal* – Article 227-22-1) or criminalise such propositioning a child regardless of the use of ICT (i.a. in Germany: *Strafgesetzbuch* – Article 176.(4).2 and 4 – the provisions do not determine the manner of making such a proposal; in Australia: *Criminal Code Act 1995* – Article 474.26 and 27, the term ‘carriage services’ was used).

In Polish criminal law, the legislator merged various approaches. The crime of grooming is criminalised in Article 200a of the Polish Criminal Code (*Kodeks karny*). In § 1 of the article, penalisation concerns an offender’s action that involves contacting a child<sup>27</sup> below the age of consent by means of an ICT system or an IT network

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<sup>26</sup> Own translation.

<sup>27</sup> Polish criminal law uses the term ‘minor’ when defining a person below 18 years of age. However, for the purpose of style and clarity in the text, the term ‘child’ is used in the article. In reference to persons who are at least 18 years old, the term ‘adult’ is used. The age of sexual consent is 15 in the Polish criminal law.

for the purpose of committing the crime of raping a child below 15 years of age (Article 197 § 3(2) of the Criminal Code); sexual intercourse with a child below 15 years of age, submission to or performance of another sexual activity, presenting pornographic content to a child below 15 years of age or showing objects of such nature or distributing pornographic content in a manner that allows the child to become acquainted with it; presenting to a child below 15 years of age a performance of sexual activity for the purpose of one's own sexual gratification or that of another person (Article 200 of the Criminal Code), as well as producing or recording pornographic content – if such contact is directly followed by the offender's pursuit of a meeting with a child, by means of misleading the child, unfair profiting from the child's error or the child's inability to properly understand the situation, or by using unlawful threats.

The offender's pursuit of a meeting with the child, which requires accountability pursuant to Article 200a § 1 of the Criminal Code, in fact, does not have to result in such a meeting. The only crucial thing is the establishment of the existence of circumstances that make it probable that the offender did pursue such a meeting.<sup>28</sup>

Article 200a § 2 of the Criminal Code criminalises the behaviour of an offender who makes a proposal of sexual intercourse, submission to or performance of another sexual activity or participation in the production or recording of pornographic content to a child below the age of consent, by means of an ICT system or an IT network, if the proposal is directly followed by a pursuit of executing such a proposal. The condition of the offender's criminal liability is their pursuit of the execution of the proposal made. According to the judgement of the Supreme Court of 17 March 2016,<sup>29</sup> such a pursuit 'also takes place when the person making such a proposal, after having made it to a minor below 15 years of age, solicits them then, also by urging, to react to the proposal, regardless of whether the urging will turn out to be effective or whether the person urged will react to such solicitation in any manner at all'.<sup>30</sup>

From the point of view of the offender's accountability, it is not important whether the child consented to participation in sexual activities or whether they initiated the relation with the offender, because any sexual relations with a child below the age of consent are prohibited by the criminal law.<sup>31</sup>

<sup>28</sup> M. Bielski, [in:] W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–211 k.k.*, Warszawa 2017, p. 759.

<sup>29</sup> IV k.k. 380/15, OSNKW 2016/6/38.

<sup>30</sup> Own translation.

<sup>31</sup> See: M. Bielski, [in:] W. Wróbel, A. Zoll (eds.), *Kodeks karny*, p. 761; R. Krajewski, *Prawnokarne aspekty dobrowolnej aktywności seksualnej małoletnich*, "Prokuratura i Prawo" 2012, 10, pp. 17–18; K. Banasik, *Głos w dyskusji o art. 200a k.k. (przestępstwo groomingu)*, "Palestra" 2010, 3, p. 52.

## Conclusions *de Lege Ferenda*

Grooming is not a phenomenon that exists exclusively in cyberspace. However, it can be particularly dangerous in that environment. This is influenced by several factors. In cyberspace, an offender may engage in more or less simultaneous activities regarding a higher number of children, without limitations on the geographical distance from a child. The offender is also vulnerable to a lesser risk of being exposed, especially if they can navigate in cyberspace. Children spend so much time in cyberspace that their certain atypical behaviours or contacts may go unnoticed by those around them. One should also not overlook the fact that in cyberspace both offenders and primarily children allow themselves to engage in behaviours that they would certainly not engage in in the real world.<sup>32</sup>

The scope of the concept of grooming is also being extended. Offenders, especially those operating in cyberspace, more and more frequently do not hide sexual intentions as regards children whom they contact, taking advantage of the children's need for attention, being heard and understood, and the offenders' process of online grooming involves convincing a child that their participation in sexual activities is something good and completely normal, or it even involves bringing the child, who is convinced that they and the offender have feelings for each other, to propose their own participation in sexual activities.

The current level of technological development, particularly the improvement and wide availability of devices allowing for the remote transmission of audio and video, combined with the globalisation of ICT, make meeting a child in the real world no longer necessary for the purpose of bringing the child to participation in sexual activities as well as for the purpose of recording such activities. Therefore, making the criminalisation of online grooming dependent on the offender's pursuit of a physical meeting with a child *de facto* offers no protection for all those victims who, due to the offender's grooming, have been brought to participation in sexual activities exclusively in cyberspace.

Another issue that requires consideration is extending the protection of children against online grooming to those who are over the age of consent,<sup>33</sup> that is, until they are 18 years of age.

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<sup>32</sup> This is a so-called online disinhibition effect, described in 2006 by John Suler. For more information, see: J. Suler, *The Online Disinhibition Effect*, "CyberPsychology & Behavior" 2004, 7(3), pp. 321–326.

<sup>33</sup> The age of sexual consent is between 13 and 20 – depending on the country, but in most cases, it is between 14 and 16. In the member states of the European Union, the age of consent is 14 (i.a. Estonia, Germany, Italy, Hungary, Austria), 15 (i.a. Poland, the Czech Republic, Denmark, France, Slovakia, Slovenia, Sweden), 16 (i.a. Belgium, Finland, Netherlands, Lithuania, Latvia), 17 (Cyprus and Ireland), and 18 – in the case of Malta. Around the world, the age of consent varies from 12 (Philippines)

Sex crimes mostly concern activities undertaken without the victim's consent. Limiting the criminal law protection of a child against grooming in cyberspace to the period before the child reaches the age of consent most probably results from the assumption that if a child is able to consent to participate in sexual activities, the child does not require any additional, special legal protection. It should be noted that even if the victim consents to participate in sexual activities, in many cases, perhaps they should be treated as a victim of sexual exploitation. This particularly concerns children who grow up differently, and even if a child reaches the age of consent, this does not mean that they are mature enough to properly understand the situation and behave in it when they are being forced or under pressure, especially if a relation with the offender (e.g. a friend of the family, an authority figure) is at play, or when there are other circumstances that can influence the child's decision regarding their own sexuality (the child is not always able to evaluate the degree of another person's emotional influence on the decision made or the long-term effects of their own actions, e.g. as regards participation in activities recorded in the form of child pornography, etc.).

It should be firmly emphasised that granting the child the right to make their own decisions about their sexuality after they have reached a certain age does not obviate the necessity of protecting the child also over that age. The adoption of 18 years of age as the upper limit that defines the concept of a child is aimed at i.a. ensuring that a child has a possibility of growing up and undisturbed mental, emotional and social development. Jeopardising the correctness of that development, particularly due to sexual pressure, should have legal consequences, regardless of whether the child's consents to participation in sexual activities or not, especially when the child can find themselves in a situation that they cannot control due to lack of maturity. Even if the child does not refuse to engage in sexual activities and, what is more, actively participates in them or even initiates them, or takes pleasure in sexual activity, this does not automatically mean that the child was not exploited. It is frequent, especially in cases of skilfully executed grooming, that a child consents to participate in activities of sexual nature not only for financial gain – which is penalised – but also because the groomer offers them interest and commitment or convinces them in a skilful way that participation in such activities is completely normal, acceptable and mature – which will not be penalised in many situations (in the case of children over the age of consent).<sup>34</sup> Furthermore,

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to 21 (Bahrain), though most frequently it is 14–16 (whereby all extra-marital sexual relations are prohibited in some countries, see i.a. Afghanistan, Kuwait, the United Arab Emirates, Iran, Sudan, Saudi Arabia).

<sup>34</sup> See: *Vuxnas kontakter med barn i sexuella syften*, Regeringskansliet, Justicedepartementet, Ds 2007:13, <https://www.regeringen.se/contentassets/dc78df9858014cb9bb4e3caaafe880fc/vuxnas-kontak->

one must not overlook the character of the virtual environment which, by making it possible to hide but a given offender's significant traits, makes it easier to convince a child that potential sexual activities in which that child will engage e.g. in front of a web camera will be anonymous. What is often forgotten is that material with the participation of the child that is obtained in this manner are available not only to the offender, but if it is shared once in an IT network, it is essentially unremovable. Each access to it may traumatise the victim again.

In principle, grooming as an activity is aimed at enabling an offender to sexually exploit a child. One must not forget the fact that it primarily involves preparing the victim, and not only preparing the crime itself.<sup>35</sup>

When one also considers the fact that provisions referring to i.a. recording, possessing, and gaining access to child pornography refer to a minor, without any lower age limit, restricting penalty for grooming exclusively to children below 18 years of age is not justified.

Besides, the research conducted indicates that grooming largely concerns older children. In 1999–2011, comparative studies were conducted in the USA on representative groups of children between 10 and 17 years of age, who were regular Internet users. The first study (YISS-1, group of 1,501 people) was conducted between August 1999 and February 2000, the second one (YISS-2, group of 1,500 people) was conducted from March to June 2005, and the third one (YISS-3, group of 1,560 people) was carried out from August 2010 to January 2011.<sup>36</sup> The results showed that sexual solicitation in cyberspace<sup>37</sup> concerns older children rather than younger

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ter-med-barn-i-sexuella-syften-ds-200713 (access: 18.07.2018), pp. 54–57; *Polisanmälda våldtäkter mot barn*, Brottsförebyggande rådet rapport 2011:6, [https://www.bra.se/download/18.744c0a913040e4033180001042/1371914718584/2011\\_6\\_polisanmalda\\_valdtkter\\_barn.pdf](https://www.bra.se/download/18.744c0a913040e4033180001042/1371914718584/2011_6_polisanmalda_valdtkter_barn.pdf) (18.07.2018), pp. 19–36; S. Ost, *Child Pornography and Sexual Grooming. Legal and Societal Responses*, New York–Cambridge 2009, pp. 6–7; K.V. Lanning, *Compliant Child Victims: Confronting an Uncomfortable Reality*, [in:] E. Quayle, M. Taylor (eds.), *Viewing Child Pornography on the Internet: Understanding the Offence, Managing the Offender, Helping the Victims*, Lyme Regis 2005, pp. 53–54.

<sup>35</sup> Differently cf. e.g.: R. Sosik, *Problematyka stosowania prowokacji w celu ujawnienia przestępstw o charakterze pedofilskim*, "Studia Iuridica Lublinensia" 2017, 4, p. 137.

<sup>36</sup> YISS-1: D. Finkelhor, K.J. Mitchell, J. Wolak, *Online Victimization: A Report of the Nation's Youth*, Crimes Against Children Research Center, National Center for Missing & Exploited Children, 2000, p. IX, <http://unh.edu/ccrc/pdf/jvq/CV38.pdf> (access: 26.03.2018).

YISS-2: J. Wolak, K. Mitchell, D. Finkelhor, *Online Victimization of Youth: Five Years Later*, National Center for Missing & Exploited Children Bulletin, Alexandria, VA 2006, p. 1, <http://unh.edu/ccrc/pdf/CV138.pdf> (access: 26.03.2018).

YISS-3: K.J. Mitchell, L.M. Jones, D. Finkelhor, J. Wolak, *Trends in Unwanted Online Experiences and Sexting: Final Report*, Durham, NH: Crimes Against Children Research Center, 2014, p. 2, <https://scholars.unh.edu/cgi/viewcontent.cgi?article=1048&context=ccrc> (access: 26.03.2018).

<sup>37</sup> Solicitation with a sexual subtext was defined in the research as requests or demands for participation in sexual activities, whereby in the case of offenders below the age of 18, only contact unwanted by the

ones – ca. 35% of solicitation cases in YISS-1, 43% in YISS-2, and 54% of cases in YISS-3 concerned children over 15 years of age.

The results of Swedish research on unwanted contact of sexual nature, which children dealt with at different times in their lives,<sup>38</sup> also point to offenders' strong interest in an older age group, i.e. in children between 14 and 17 years of age (ca. 14% of cases in the group of 14-year-olds, and ca. 13% of cases in the group of children between 15 and 17 years of age). It should be stressed that in the Swedish study, the participants were asked about their age at which the first contact occurred, therefore, the indicators can be higher, particularly for the eldest children. Additionally, in the group of elder children, a high percentage of contact was defined by the children as very stressful (31% in the group of 14-year-olds and over 37% in the group of children between 15 and 17 years of age, whereas that percentage was definitely lower in the groups of younger children: ca. 10% in the group of 12-year-olds, and 17% in the group of 13-year-olds).

In the light of research and opinions of i.a. therapists, who indicate that children frequently experience typical symptoms of psychological trauma as the consequences of grooming, which are comparable to trauma resulting from sexual exploitation, often even contact with an offender does not lead to the physical exploitation of a child,<sup>39</sup> special legal protection of children, regardless of their age, is seen as extremely crucial. This is all the more important that, as indicated in the literature, the grooming process itself and its methods, used against the victims, may have long-term effects at the psychological level that are comparable to the effects of physical exploitation.<sup>40</sup> Therefore, one must not overlook the process of grooming itself when discussing its criminalisation, regardless of whether grooming leads to child sexual exploitation at all.

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victim was considered; in the case of adults, i.e. individuals over 18 years of age, all forms of contact of such nature were taken into account.

<sup>38</sup> The research was conducted in 2006 on a representative group of 1,019 children between 16 and 17 years of age, who were regular Internet users. D. Shannon, *Vuxnas sexuella kontakter med barn via Internet. Omfattning, karaktär, åtgärder. Rapport 2007:11*, Brottsförebyggande rådet (BRÅ), Västerås 2007, p. 86.

<sup>39</sup> See: J. Mierzwińska-Lorencka, *Karnoprawna ochrona dziecka przed wykorzystywaniem seksualnym*, Warszawa 2012, p. 83; Fundacja Dajemy Dzieciom Siłę (formerly Fundacja Dzieci Niczyje), *Dziecko w Sieci. Zapobieganie wykorzystywaniu seksualnemu dzieci w Internecie*, Warszawa 2010.

<sup>40</sup> A.-M. McAlinden, op. cit., pp. 129–130; J. Mierzwińska-Lorencka, op. cit., p. 83.



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